86

Supreme Court, U.S.
FILED
071098 FEB 19 2008
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CAROLINE HOELSCHER-KOSEL,
PETITIONER

v.

JAMES NICHOLSON, SECRETARY OF
VETERANS AFFAIRS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LANELLE L. MCNAMARA
Counsel of Record

LaNelle L. McNamara P.C.
1921 Austin Ave.
Waco, TX 76701
(254)754-5458

Attorney for Petitioner

CURRY & TAYLOR ♦ (202) 393-4141

QUESTION PRESENTED

Petitioner contends that there is sufficient evidence in this case to support a jury issue as to whether or not the evidence was sufficient to support a claim for retaliation based on the reassignment of Petitioner's duties which resulted in a material adverse action under the facts and circumstances of this case.

The standard of review for Title VII retaliation claims is now set forth in **Burlington Northern & Santa Fe Railway Co.**, 126 S.Ct. 2405, 2414 (2006), wherein the court held that :

(1) application of Title VII retaliation provision is not limited to employer's employment related or workplace actions, abrogating *Von Funten v. Maryland*, 245 F.3d 858, *Robinson v. Pittsburg*, 120 F.3d 1286, *Mattern v. Eastman Kodak Co.*, 103 F.3d 7021, and *Manning v. Metropolitan Life Ins. Co.* 127 F.3d 686.

(2) retaliation provision contains materiality requirement and objective standard;

(3) whether reassignment of duties constituted materially adverse action was jury question; ...

The **Burlington** court stated that the Title VII retaliation provision required a "showing that a reasonable employee would have found employee's challenged action materially adverse, " and/or "the challenged action could dissuade a reasonable worker from making or supporting a charge of

discrimination, "whether or not the harm occurs in the workplace."

Petitioner contends that there was sufficient evidence to support a jury issue as to whether or not Petitioner's retaliation claims were supported by sufficient evidence showing that "a reasonable employee would have found employee's challenged action(s) materially adverse." Petitioner's claim for retaliation was based on the "reassignment of Petitioner's duties" which constituted a materially adverse action under the facts and circumstances of this case. Specifically, Petitioner had been employed by the Waco VA as a Physician's Assistant assigned to deliver direct outpatient and inpatient health care beginning in 1995. On March 30, 2003, Dr. T. Ulf Westblom ("Westblom"), who was Acting in the stead of Dr. Valerie Van Wormer, Chief of Staff, who was on pregnancy leave, when Dr. Westblom reassigned Kosel to a non-medical service, thereby foreclosing Kosel's opportunities to deliver patient health care. Kosel's duties were limited to the duties of a filing clerk who maintained registries of VA, e.g. Agent Orange Registries and other related Registries, but she was not allowed to deliver patient medical care unless her supervisor was unavailable. Kosel had consistently received "Outstanding" performance evaluations during the time that she was delivering direct outpatient and inpatient care, beginning in 1995 and continuing to 2003, when Westblom reassigned Kosel to a non-medical service, thereby depriving Kosel of limited opportunities to utilize her medical skills from 2003 to 2007. Without daily interaction with health care providers and patients, Kosel was required to utilize her personal and family time so that she could keep up with the literature that was essential for the renewal of her license as a Physician's

Assistant. From 2003 to 2007, Kosel was deprived of the extremely limited opportunities for her to deliver patient care. Instead, Kosel initiated a lawsuit claiming that Westblom retaliated against her when she was removed from a medical service to a non-medical service, depriving her of her career as a health care provider for VA patients.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 9

CONCLUSION 18

APPENDIX

Circuit Court Opinion 1a
District Court Decision 7a
District Court Order Denying Reconsideration 28a
Order Denying Petition for Rehearing 29a
Relevant Provisions Involved 30a

TABLE OF AUTHORITIES

Page

CASES
BOTHWELL V. RMC EWELL, INC.,226 FED.APPX. 925 (11TH CIR.-APRIL 3, 2007) 18
BURLINGTON NORTHERN & SANTA FE RAILWAY CO, 126 S.CT. 2405, 2414 (2006) 14
FREITAG V. AYERS, 468 F.3D 528 (9TH CIR.-AMENDED NOV. 3, 2006) 17
GRAHAM V. AT&T MOBILITY,, 2007 WL 2565999 (7TH CIR.).. 16
HARE V. POTTER, 220 FED.APPX. 120, (3RD CIR.--MARCH 21, 2007) 16
HOLLOWAY V. DEPARTMENT OF VETERANS AFFAIRS, 2007 WL 2116475(5TH CIR.) 16
JOHN LEARY, AND KENNETH T. LYONS, 2007 WL 2812118 (1ST CIR.) 15
MANNING V. METROPOLITAN LIFE INS. CO., 127 F.3D 686.. 14
MATTERN V. EASTMAN KODAK CO., 103 F.3D 7021 14
ROBINSON V. PITTSBURG, 120 F.3D 1286 14
VELIKONIA V. GONZALES, 466 F.3D 122, 373 U.S.APP.D.C.276 (D.C.CIR-2007) 15
VON FUNTEN V. MARYLAND, 245 F.3D 858 14
WILLIAMS V. W.D.SPORTS, N.M., INC., 497 F.3D 1079 (10TH CIR-AUG.7, 2007) 17

STATUTES
28 U.S.C. § 1254(1) 1

RULES
5TH CIR. R. 47.5 1
5TH CIR. R. 47.5.4 1
SUPREME COURT RULE 13.1 1

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Texas is dated on the 23rd of October, 2006; and the Order on Plaintiff's Morion for Reconsideration of Order Granting MSJ was denied on December 12, 2006.

The Court of Appeals for the Fifth Circuit, No. 07-50061, pursuant to 5TH CIR. R. 47.5, determined that the opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 18, 2007. A Petition for Rehearing and Petition for Rehearing En Banc was timely filed, and was denied on November 20, 2007. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

This civil action was filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C., 2000-3, et seq.

STATEMENT

Kosel, a certified Physician Assistant ("PA"),

began working for the VA in Waco, Texas in 1995.[1] Shortly after she was employed at the VA in Waco, the VA in Waco, Temple, and Marlin integrated their facilities, forming the Central Texas Veterans Health Care System, and Kosel transferred to the Temple VA.

Kosel worked in the outpatient Primary Care section from 1995-1998, treating outpatients. She was actively involved in direct patient care. She also trained medical students, residents, fellows, and physician assistants, who worked at the VA.[2]

In June of 1998, Kosel was invited to be a PA on the new inpatient "hospitalist" team. In July of 1998, Dr. T. Ulf Westblom ("Westblom"), Chief of Medical Service, notified Kosel that she was **not** going to be a PA on the hospitalist team; and Westblom was assigning Kosel to develop a telemetry system in the cardiology unit. Kosel told Westblom that she had never worked in cardiology, and she had never developed a telemetry system. She also told Westblom that her goal was to work with the VA inpatients who were going to receive benefits in the new inpatient "hospitalist" unit and she had been invited to on the new "hospitalist" team. Regardless of Kosel's statement of **her** goals, Westblom **forced** Kosel to be reassigned to the cardiology unit.

Kosel contends that, beginning in July of 1998, Dr. Westblom repeatedly interrupted and/or

---

[1]Prior to that time she had worked in physician's offices in the private sector for approximately six years.

[2]Kosel's Affidavit/Statement of Facts was included in Petitioner's Appendix, at Tab 4.

reassigned Petitioner's duties and the reassignments that he demanded involved "materially adverse actions" that ultimately undermined her efforts to continue her profession as a PA. In March of 2003, Westblom finally reassigned Kosel to a non-medical service where she was seldom able to deliver health care to any veterans. Instead, she was relegated to a position wherein she served as a clerk , filling out Registry forms for veterans, but she could not treat their maladies. Kosel received outstanding performance evaluations from the time that she began working for the VA. Her clinical skills were excellent, but Dr. Westblom destroyed her career on March 30, 2003, when she could no longer deliver health care to veterans.

In May of 1999, Kosel miscarried her first child. While she was grieving over the loss of her first child, without explanation, Westblom reassigned Kosel to the intermediate care ward *aka* "nursing home." When Kosel assumed her duties in the nursing home, she immediately learned that a JCAHO review was imminent. The nursing home was grossly overcrowded and Kosel was responsible for reducing the patient census from 60 to 30 patients in less than two months. Dr. Price, the Chief Medical Officer, assigned Dr. William Quinn, a physician and a geriatrician, to work with Kosel. Written policies and discharge protocols had to be developed and major deficiencies had to be addressed if the VA was going to pass the JCAHO survey. In July, when the survey team arrived, the patient census was reduced from 60 to 23 patients and the deficiencies had been corrected.[3]

---

[3]The work performed by Kosel and Quinn was staggering and the

Dr. Quinn returned to the hospitalist team after the survey was completed.[4] Pat Brown, a female nurse practitioner, who had been working on the hospitalist unit, was assigned to follow up on the protocols in the nursing home. Shortly thereafter, Westblom hired a new PA, Joe Bielik ("Bielik"), who was assigned to work with Brown in the nursing home. In November, 1999, Kosel finally got to join the hospitalist team.

Kosel took maternity leave in June, 2000, delivered her son, and returned to the hospitalist unit. Kosel took a second maternity leave in July of 2001. As Kosel was leaving for her second maternity leave, Westblom told Kosel "that her job would **not** be waiting for her when she returned from maternity

---

"savings" that could be returned to the VA was estimated to be approximately two million dollars over the course of a fu.. year. Drs. Price and Quinn prepared an application for Kosel to receive a substantial monetary performance award of $13, 000, based on the then-current VA "savings" Schedule. When Dr. Price submitted an application for Kosel to receive $6000, Nancy Beimer, Westblom's administrative assistant, told Dr. Price that there was no money available for an award. Beimer did not submit Kosel's application to the awards committee and Beimer did not tell Dr. Price that he could resubmit his application for Kosel when money became available. Kosel had to be satisfied with a 4-hour time off award, and spot cash awards totaling $550.00.

[4]Dr. Quinn had filed prior EEO retaliation complaints against the VA and a complaint with the Inspector General, involving patient care concerns and ancillary issues. In 1999, Quinn filed a lawsuit in the U. S. District Court for the Western District of Texas, which included a claim for retaliation and a claim for whistleblower protection. Westblom was an antagonist in Quinn's case. In March of 2001, Judge Walter S. Smith, Jr. entered a Memorandum Opinion and Order denying the VA's Motions for Summary Judgment and Quinn's case settled in the summer of 2001.

leave." Westblom said that he had made an agreement with the Chief of Staff, Dr. Valerie Van Wormer ("Van Wormer"), that he could combine two PA's salaries to pay for another physician for the hospitalist unit, but he could retain only **one** PA.

On October 1, 2001, Kosel returned from maternity leave and resumed her assignment with the hospitalists. Bielik was still assigned to the nursing home. Westblom began encouraging Bielik to learn to perform bone marrow biopsies in the Oncology outpatient unit, in addition to his other nursing home duties.[5]

In April of 2002, Dr. Price was relieved of his duties in the hospitalist unit and he assumed the duties

---

[5]Ruby Gunn, a medical tech with 20+ years of service, had been performing bone marrow biopsies in the Oncology outpatient clinic, in addition to her other duties. When Gunn retired in December, 2001, she offered to perform biopsies on a part-time fixed-fee contract, but Westblom rejected her offer. Gunn was a GS-9 employee, with a salary of $58,593. Bielik's salary at a GS12, Step 10, was $81,107. After Bielik completed his training to perform the biopsies, Westblom recommended Bielik for a $2500 award, contending that Bielik was "saving" money for the VA (App., Tab Ex. 18) Assuming that the time needed to perform a biopsy was the same for Gunn and Bielik, the VA paid Bielik an excessive amount of money per procedure and the VA was actually losing money. Under the VA practice and procedures for awards, Westblom was not authorized to submit a request for Bielik to receive a monetary award because Westblom was not Bielik's immediate supervisor. Nonetheless, Bielik received an award of$3000. When Kosel was recommended for an award in connection with the JCAHO survey in July of 1999, Drs. Price and Quinn recommended that Kosel receive a substantial monetary award for her efforts, but their recommendation was never considered by the Awards Committee.

as the Chief of Employee Health and Environmental Medicine ("EHEM"), a non-medical service.

In July, 2002, Westblom called Kosel into his office to offer her a position in pulmonary service, but Kosel had absolutely no skill and/or no interest in pulmonary care. Kosel also learned that Bielik, with lesser seniority than Kosel, had refused to accept assignment in the pulmonary service. Westblom then asked Kosel to go to cardiology but Kosel refused.[6] Westblom then asked Kosel if she would go to cardiology if he forced the male PA in cardiology to go to pulmonary. Kosel told Westblom that she was senior to Bielik, who was still assigned to the nursing home. Kosel also had more seniority than the male PA in cardiology and she wanted to stay and she deserved to stay on the hospitalist team.

In August, 2002, Kosel spoke by telephone with Dr. Van Wormer, who was the VA's Chief of Staff. Van Wormer told Kosel that "her name (i.e. "Kosel") had never been mentioned as the one to be reassigned." Van Wormer said that she really needed to reassign a PA to "C&P" (Compensation & Pension), a non-medical assignment, and the PA would not be engaged in direct patient care.

In September, 2002, Van Wormer drafted a memo "temporarily detailing" Kosel to C&P. Kosel and the Union President, Clementine Ray ("Ray"), met with Van Wormer to advise her that Kosel had

---

[6]Kosel later learned that another PA male, with lesser seniority than Kosel, had refused to transfer from cardiology to pulmonary.

previously worked with the current Chief of C&P and Kosel had overheard offensive "sexual innuendos" in phone conversations and had witnessed inappropriate "propositions" to some of the dietetic interns. Kosel had reported this activity to her supervisor, who was Dr. Price, and he told Kosel that she could do her charting, etc. in a vacant office close to Dr. Price's office. As a result of this disclosure, Van Wormer notified Kosel that she would be allowed to stay on the hospitalist team and she would be reassigning Bielik from the nursing home to C&P, because Bielik would be able to perform bone marrow biopsies in the Oncology outpatient unit as needed.

In October, 2002, Kosel began submitting informal and formal EEO Complaints, as follows: (a) On October 4, 2002, Kosel and the Union President, Ray, contacted an EEO counselor in Houston because Westblom was insisting that Kosel should also begin training to perform bone marrow biopsies, even though Bielik was already performing the bone marrow biopsies in the Oncology outpatient clinic in addition to his C&P duties; and (b) Kosel learned that Bielik had received a $3000.00 monetary award for assuming the duties relating to bone marrow biopsies. Kosel had been recommended for a substantial monetary award for her performance in 1998 relating to her development of the cardiology telemetry unit; and, in 1999, she had been recommended for a substantial monetary award after she revised the nursing home procedures and protocols, reportedly "saving the VA millions of dollars" in connection with the JCAHO survey, but Kosel never actually received any "substantial monetary award" for her work; and (c) in September, 2002, Kosel had been notified that she

would be "temporarily detailed" to C&P and Joe Bielik was going to be assigned to the hospitalist unit, despite the disparity between the seniority and skill of Kosel vs. the seniority and skill of Bielik. Respondent claims that all three of Kosel's complaints were filed as "gender based" claims; however, Kosel's formal "Complaint of Employment Discrimination", filed on November 12, 2002, stated that the complaint included claims of both sex discrimination and retaliation. [7]

On January 17, 2003, a Partial Acceptance Letter from the VA Office of Resolution Management ("ORM") was sent to the Union President advising her of a partial acceptance of Kosel's formal EEO complaint, filed on November 25, 2002. In short, ORM stated that the claims to be addressed for investigation were "training, award, and reassignment." The letter stated that Kosel's claims for "training"[8] and "award" were accepted for investigation, but Kosel's "proposed detail to C&P had not been accepted for investigation because Van Wormer had not enforced Kosel's "proposed detail to C&P."

On March 30, 2003, Westblom, acting in the stead of Van Wormer while she was on her last day of

---

[7]In a statement affixed to her formal EEO complaint, Kosel stated that Dr. Quinn, in his prior EEO complaint, "stated that he felt that Dr. T. Ulf Westblom would retaliate against an "unnamed female employee, Dr. Alan Price, and Ms. Pat Brown for supporting him during an IG investigation" and Kosel identified herself as the "unnamed female employee."

[8]Kosel later withdrew her "training" claim re: bone marrow biopsies because of a disability that reduced the strength in her right arm and hand.)

maternity leave, reassigned Kosel to Employee Health and Environmental Medicine ("EHEM"). Westblom reassigned Bielik from C&P (a non-medical service) to the hospitalist unit (a medical service) and Westblom reassigned Kosel from the hospitalist unit (medical service) to EHEM (non-medical service). On May 2, 2003 and May 8, 2003, ORM sent a letter of acceptance noting Kosel's involuntary reassignment to EHEM Service, and Kosel began pursuing her EEO complaint(s).

After March 30, 2003, Kosel had to function as a clerk who fills out pre-printed forms. She was not allowed to deliver direct patient care except during times that her supervisor was not available. She had to keep up her PA certification by studying case files, books, treatises, etc. on her off-duty personal time instead of keeping her credentials current through engaging in direct patient care on a daily basis. After Kosel was transferred to a non-medical service, she suffered excruciating and persistent mental anguish, including suffering from Bell's Palsy for approximately six months following her reassignment to EHEM.

REASONS FOR GRANTING THE PETITION

A. The facts cited in Petitioner's Brief before the Fifth Circuit were not accurately stated in the Panel's Summary Opinion.

Kosel was employed at the Temple VA as a PA in the outpatient Primary Care section from 1995 to 1998. In June, 1998, Kosel had been invited to be a PA in the new "hospitalist" unit, but Westblom reassigned her to the cardiology unit to develop a telemetry

system. In May of 1999, Kosel miscarried her first child and Westblom summarily reassigned her to the nursing home. Kosel was officially assigned to the hospitalist unit in November of 1999. In September of 2002, Kosel was "temporarily detailed" to C & P, but Van Wormer agreed to allow her to stay on the hospitalist team. Between October, 2002 and March 30, 2003, Kosel was the **only** PA on the hospitalist team. Kosel had an impeccable record of delivering total inpatient care with the hospitalist team for almost four years. Her performance evaluations while working on the hospitalist unit were outstanding in all regards. As noted earlier, Van Wormer "temporarily detailed" Kosel to C&P in September, 2002, and Kosel and the Union President met with Dr. Van Wormer. Kosel disclosed her observations of potential sexual harassment on the part of the Chief of C& P, in the past. Van Wormer revoked her assignment and Kosel was allowed to stay on the hospitalist team. Beginning in January of 2003, Van Wormer was on maternity leave. On March 30, 2003, the last day that Westblom was serving was *acting Chief of Staff* for Van Wormer, and Westblom involuntarily reassigned Kosel to "EHEM". Kosel immediately contacted her EEO counselor to amend her EEO complaint.

Joe Bielik was hired in November, 1999, four years ***after*** Kosel had been employed by the VA. Bielik was assigned to work with Pat Brown in the nursing home until she transferred to the Marlin VA in the spring of 2000. Bielik continued to work in the nursing home from November, 1999, until he was reassigned to C&P, a non-medical service, in October, 2002. On March 30, 2003, Westblom assigned Bielik to the hospitalist team.

On March 26, 2003, Westblom had met with Kosel and the Union President, Ray, to notify them that he, Westblom, acting in the stead of Chief of Staff Van Wormer who was on maternity leave, was transferring Kosel to a department outside of medical services. Both Kosel and Ray objected to Kosel's reassignment on the basis that Kosel was more senior than Bielik. Despite their objections, Westblom reassigned Kosel to EHEM, which was not a medical service and Kosel was no longer allowed to treat patients unless her supervisor was not available. From that time forward, Kosel functioned as a file clerk, filling out forms for VA Registries.

In the Fifth Circuit's Panel Opinion, it appears that the panel believed that Bielik had been on the hospitalist team for three +years before Kocel was transferred to a non-medical service and Bielik would assume Kosel's job in the hospitalist unit. This was **not** true. Kosel captured her position on the hospitalist team in November, 1999. From October, 2002 to March of 2003, Kosel was the only PA on the hospitalist team. When Westblom decided to assign Bielik to the hospitalist team in March of 2003, Westblom was forced to find a position for Kosel before his tenure expired as **acting Chief of Staff** and Bielik, instead of Kosel, became the only PA on the hospitalist team.

B. The evidence in this case is sufficient to sustain the allegations of discrimination and retaliation in this case.

1. Kosel's Monetary Award. In Kosel's EEO Administrative Hearing, Kosel's immediate supervisor, Dr. Price, testified to the facts set forth in Footnote 2,

p. 3 above.

2. Bielik's Monetary Award. In late 1999, Bielik was hired by Westblom and Bielik was assigned to the nursing home through October of 2002, when Bielik was assigned to C&P, a non-medical service. Beginning in January of 2002, Westblom had urged Bielik to volunteer to be trained to perform bone marrow biopsies. After training, Bielik amended his Scope of Practice to include bone marrow biopsies. Bielik's salary was not affected, nor was he supposed to be getting overtime pay for his assigned duties, including bone marrow biopsies. In October of 2002, Bielik was assigned to C&P, which was a non-medical service, but Bielik was allowed to perform bone marrow biopsies as needed in the Oncology outpatient clinic.[9] Westblom argued that Bielik was "saving" money for the VA when he performed the bone marrow biopsies. (See FN 4 above ,)

3. On September 17, 2002, Kosel and the Union President, Clemmie Ray, met with Westblom to

---

[9]In 2003, Bielik was working in C & P and performing biopsies as needed. His records reflect that he usually performed one or two biopsies per week, in the oncology clinic. For the full year of 2003, Bielik's records reflected 97 biopsies, with a fairly high error rate of 37% suboptimal biopsies. From 1/1/2004 to 8/31/04, Bielik performed 74 biopsies, with an even higher error rate of 45% suboptimal. (App., Ex. 5.) When Westblom drafted his recommendation for Bielik's monetary award, Westblom inflated the number of biopsies to 230, when the actual number was less that 100. Westblom also concluded that Bielik's willingness to perform the biopsies saved the VA about "$75,000", which was approximately equal to the Gunn salary prior to her retirement. (App, Ex. 18)

discuss whether or not Kosel was going to have to be trained to perform biopsies. After the meeting, Kosel and Ray encountered Dr. Mulhopadhyay, Chief of Hematology/Oncology and Mulhopadhyay stated that:

> "...he had discussed this with Dr. Westblom previously and that he suggested a tech be trained to do them. He stated that **he had told Dr. Westblom that bone marrow aspirations did not have to be performed by a physician, a PA, an NP, nor a nurse, simply a tech who had been trained to perform them. He stated that he had told Dr. Westblom this was a waste of physician/PA/NP/nurse time. Kosel asked him again if she was qualified to perform bone marrows, and he stated "Kosel was overqualified."**

3. Gender Discrimination Claims. In the EEO hearing on September 2, 2004, Westblom testified as follows (EEO Hearing, pp. 189-236):

> "Westblom, was 'unaware' of the EEO complaints that Kosel had filed in October/November of 2002. In March of 2003, he transferred Kosel to 'EH EM'. He admitted that he was **acting** Chief of Staff when Kosel was reassigned, that Kosel's reassignment was effective on March 30, 2003, that Kosel was reassigned on the last day of Westblom's tenure as **acting** Chief of Staff, in the stead of Dr. Valerie van Wormer's pregnancy leave and that Kosel's reassignment was certainly ***not*** a promotion for her. Westblom never consulted with any other administrators, including Kosel's

> supervisors, Roby and Price, prior to reassigning Kosel. Westblom, who was serving as **acting** Chief of Staff, also stated that "he did **not** consult with the Chief of Staff, who was on maternity leave, before he assumed responsibility for reassigning Kosel." When asked whether or not Kosel's reassignment to a non-medical service would necessarily undermine her skills since she would **not** be engaged in treating patients on a daily basis, Westblom responded that "he had no thoughts about the fact that Kosel's skills as a PA might be detrimentally affected by her reassignment to a non-medical service." When asked about whether or not her recertification as a PA would be compromised because she would **not** be treating patients, Westblom stated that he "didn't know what it means to lose proficiency as a PA" and he "didn't know what the rules are for certifications of PA's."

4. Retaliation Claim. The standard of review for Title VII retaliation claims are now set forth in **Burlington Northern & Santa Fe Railway Co**, 126 S.Ct. 2405, 2414 (2006), wherein the court held that:

> (a) application of Title VII retaliation provision is not limited to employer's employment related or workplace actions, abrogating *Von Funten v. Maryland*, 245 F.3d 858, *Robinson v. Pittsburg*, 120 F.3d 1286, *Mattern v. Eastman Kodak Co.*, 103 F.3d 7021, and *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686;

(b) retaliation provision contains materiality requirement and objective standard;

(c) whether reassignment of duties constituted materially adverse action was jury question; and

The **Burlington** court stated that the Title VII retaliation provision requires "showing that a reasonable employee would have found employee's challenged action materially adverse, i.e. that challenged action could not dissuade reasonable employee from protected conduct."

5. CASES RELYING ON ISSUES RAISED BEFORE AND AFTER *BURLINGTON*:

Dixon v. International Brotherhood of Police Officers, Local 382;

John Leary, and Kenneth T. Lyons, 2007 WL 2812118 (1st Cir.(Mass.))

Velikonia v. Gonzales, 466 F.3d 122, 373 U.S.App.D.C.276 (D.C.Cir–2007)

The District Court's decision was issued before ***Burlington*** was decided. Nevertheless, the court held that a Title VII plaintiff need not allege an adverse employment action to state a claim for retaliation, but rather must show that the employer's actions are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." The Court also held that a

reasonable jury could find that the prospect of an investigation could dissuade a reasonable employee from making or supporting a charge of discrimination, and the court reversed the dismissal of Velikonja's retaliation claim and remanded the claim for further consideration by the District Court.

Hare v. Potter, 220 Fed.Appx. 120, (3rd Cir.--March 21, 2007)

The Third Circuit U.S. Court of Appeals, post-***Burlington***, reversed the District Court's blanket grant of summary judgment in this case and remanded for the District Court to consider Hare's retaliation claims. In all other respects, the Court of Appeals affirmed the Order of the District Court.

Holloway v. Department of Veterans Affairs, 2007 WL 2116475 (5th Cir.(Tex))

The District Court granted a motion for summary judgment of Department of Veterans Affairs and Anthony Principi, Secretary of VA. The Fifth Circuit vacated the award of summary judgment on Holloway's retaliation claim under Title VII of the Civil Rights Act of 1964 and remanded the case for a determination consistent with ***Burlington*** because this circuit's standard for determining an adverse employment action is no longer limited to ultimate employment decisions."

Graham v. AT&T Mobility,, 2007 WL 2565999

(7thCir.(Ill.)

In ***Burlington***, the court stated "We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Freitag v. Ayers, 468 F.3d 528 (9th Cir.–Amended Nov. 3, 2006)

In this case, there was an issue of whether or not agents of CDCR retaliated against Freitag as a result of her complaints. The Court stated: "For these reasons, we affirm the jury's verdict with respect to the CDCR's liability under Title VII. However, due to an intervening Supreme Court decision, i.e. ***Burlington***, we remand for reconsideration of the jury's finding that Freitag's superiors retaliated against her in violation of her First Amendment Rights in light of the instructional error regarding constitutionally protected speech. In this connection, the court directed the district court to determine whether such error was harmless. (See FN7, at p. 542 and p. 438,)

Williams v. W.D.Sports, N.M., Inc., 497 F.3d 1079 (10th Cir–Aug.7, 2007)

See discussion relating to ***Burlington*** beginning on p. 1087 through 1091.

Bothwell v. RMC Ewell, Inc.,226 Fed.Appx. 925 (11th Cir.–April 3, 2007)

The Court of Appeals held that remand was warranted to allow District Court in the first instance to address employee's claim in light of changes in the law set forth in ***Burlington***.

CONCLUSION

WHEREFORE, Kosel contends that there is sufficient evidence to raise a jury issue as to whether or not the repeated "reassignment of [Kosel's]duties constituted materially adverse action was a jury question" under the facts and circumstances set forth in this case; and, for all of the foregoing reasons, Petitioner Caroline Hoelscher-Kosel requests that this Honorable Court remand this case for trial on the merits; or alternatively, reverse (1) the Fifth Circuit's decision and (2) reverse the district court's order granting summary judgment and render judgment in favor of Petitioner in this case.

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
LaNelle L. McNamara
Counsel of Record
LaNelle L. McNamara, P.C.
1921 Austin Ave.

Waco, Texas 76701
Telephone (254) 754-5458

(any footnote(s) trail end of each document)

No. 07-50061 Summary Calendar
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CAROLINE HOELSCHER-KOSEL,
Plaintiff-Appellant

v.

JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS,
Defendant-Appellee

September 18, 2007, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For CAROLINE HOELSCHER-KOSEL, Plaintiff - Appellant: LaNelle Linnstaedter McNamara, Waco, TX.

For JIM NICHOLSON, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, Defendant - Appellee: R Barry Robinson, Assistant US Attorney, US Attorney's Office, Western District of Texas, Austin, TX.

JUDGES: Before JOLLY, DENNIS, and PRADO, Circuit Judges.

OPINION

PER CURIAM: *

Plaintiff-Appellant Caroline Hoelscher-Kosel appeals the district court's grant of summary judgment for the Defendant-Appellant James Nicholson, Secretary of Veteran Affairs, on her retaliation claim. We AFFIRM.

FACTS

Hoelscher-Kosel is a female Physician's Assistant employed at the Temple, Texas VA Hospital. She began working at Temple in September 1995, at which time she was assigned to the Primary Care section. In November 1999, she was reassigned to the Hospitalist Team. Following a staffing review of the Hospitalist program that began in 2001, hospital personnel determined that the number of Physician Extenders on the Hospitalist Team should be reduced from two to one. Because Hoelscher-Kosel, unlike the other Physician Extender Joe Bielik, had not been trained to perform bone marrow biopsies, hospital personnel decided to keep Bielik on the Hospitalist Team and to transfer Hoelscher-Kosel to the Compensation and Pension (C&P) section to assist in performing C&P examinations in September 2002. Shortly thereafter, hospital personnel learned that Hoelscher-Kosel had previously worked with the Chief of C&P, who she alleged had sexually harassed her. She was then immediately returned to the Hospitalist Team and Bielik was transferred to C&P. In that position, Bielik continued to perform bone marrow biopsies on a limited basis for the Hospitalist Team. After her return to the Hospitalist Team, Hoelscher-Kosel began bone marrow

training but was unable to successfully complete the training because of a physical limitation. On November 12, 2002, she filed an employment discrimination complaint with the VA's Equal Employment Office, alleging gender discrimination on the basis of the reassignment to C&P and other conduct by hospital personnel.

In March 2003, the Employee Health and Environmental Medicine Department received approval for a full-time Physician Extender. The Hospital's Acting Chief of Staff, Dr. T. Ulf Westblom, proposed to reassign Hoelscher-Kosel to Employee Health and Environmental Medicine and to move Bielik back to the Hospitalist Team. Because this plan involved transferring Hoelscher-Kosel to a department outside of Medical Services, it required discussion with the employee union before implementation. On March 26, 2003, Dr. Westblom met with Hoelscher-Kosel and the union president, Clementine Ray, to discuss the proposed reassignment. Hoelscher-Kosel and Ray objected on the basis that Hoelscher-Kosel was more senior than Bielik. Despite their objections, Dr. Westblom ultimately decided on March 28, 2003 to reassign Hoelscher-Kosel to Employee Health and Environmental Medicine and to move Bielik back to the Hospitalist Team. Hoelscher-Kosel's reassignment did not result in a loss of grade, pay, or benefits.

On January 18, 2005, Hoelscher-Kosel filed this suit in the United States District Court for the Western District of Texas against James Nicholson, in his official capacity as Secretary of the Department of Veteran Affairs(VA), pursuant to Title VII of the Civil Rights Act of 1964, alleging gender discrimination and

retaliation. On October 23, 2006, the district court granted the VA summary judgment on all of Hoelscher-Kosel's claims, finding that she had failed to make out a prima facie case of retaliation and that she did not show that the VA's legitimate, nondiscriminatory reason was a pretext for gender discrimination and retaliation. Hoelscher-Kosel now appeals the district court's grant of summary judgment solely on the retaliation claim.[1]

ANALYSIS

We review the district court's grant of summary judgment *de novo*, using the same standards applied by the district court. *Storebrand Ins. Co. U.K., Ltd. v. Employers Ins. of Wausau*, 139 F.3d 1052, 1055 (5th Cir. 1998).

Under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the plaintiff must first establish a prima facie case for retaliation, which requires a showing that: (1) she engaged in activity protected by Title VII; (2) her employer took an adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse employment action. *See, e.g., McCoy v. City of Shreveport*, 492 F.3d 551, 556-57 (5th Cir. 2007). Once the employee has established a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory or nonretaliatory reason for its employment action. *See Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002). If the employer meets its burden, the plaintiff then bears the ultimate burden of proving that the employer's proffered reason is not true and instead is a pretext for the real retaliatory purpose.

McCoy, 492 F.3d at 557.

The district court correctly granted summary judgment on HoelscherKosel's retaliation claim. Pretermitting the issue of whether Hoelscher-Kosel made a prima facie showing of retaliation, she has failed to rebut the VA's proffered legitimate reason for her reassignment to the Employee Health and Environmental Medicine Department. Namely, after a staffing review, hospital personnel decided to reduce the number of Physician Extenders from two to one on the Hospitalist Team as part of the VA's plan to move to more full-time Physicians. Concurrently, hospital personnel determined that there was an ongoing need for the remaining Physician Extender to be able to perform bone marrow biopsies for quality of care reasons. Because Bielik was trained to perform the procedure, whereas Hoelscher-Kosel was not, the VA decided to move Bielik back to the Hospitalist Team and to reassign Hoelscher-Kosel. Thus, Hoelscher-Kosel has failed to create a genuine issue of material fact as to whether the VA's decision to reassign her to the Employee Health and Environmental Medicine Department was a pretext for retaliation.

Because this court affirms the district court's grant of summary judgment on this basis, it need not address appellant's argument that the district court improperly applied the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) to find that she had not established a prima facie case of retaliation.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment on Hoelscher-Kosel's retaliation claim is AFFIRMED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1The VA cross-appeals the district court's denial of its motion to dismiss HoelscherKosel's retaliation claim for failure to exhaust administrative remedies. Because we affirm the district court's grant of summary judgment on the retaliation claim for other reasons, we need not address this argument.

CIVIL ACTION NO. W-05-CA-021
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CAROLINE HOELSCHER-KOCE Plaintiff,
v.
R. JAMES NICHOLSON, Secretary, Department of Veterans Affairs, Defendant.

MEMORANDUM OPINION AND ORDER

Caroline Hoelscher-Kocel ("Plaintiff") brings this action against James Nicholson, Secretary, Department of Veterans Affairs ("Defendant") alleging discrimination based on her female gender and reprisal for prior protected activity, under Title VII of the Civil Rights Act of 1964. Before the Court is Defendant's Motion to Dismiss Or, In The Alternative, For Summary Judgment. Having considered the Motion, response, pleadings, and applicable law, the Court finds that the Motion For Summary Judgment is meritorious and should be granted.

II. PROCEDURAL BACKGROUND

On October 4, 2002, Plaintiff contacted an Equal Employment Opportunity ("EEO") counselor and through her Union President, Ms. Clementine Ray ("Ray"), filed her informal complaint of discrimination. On November 1, 2002, the EEO counselor corresponded with Ray specifically defining Plaintiff's sex discrimination complaint and advising her of Plaintiff's right to file a formal discrimination complaint.

On January 17, 2003, a Partial Acceptance Letter from the Department of Veterans Affairs, Office of Resolution Management (ORM), was sent to Ray advising her of the partial acceptance of Plaintiff's complaint of discrimination that she filed on November 25, 2002. In this letter, ORM specifically stated that the claims to be addressed as identified by Plaintiff are reassignment, training, and award. Her sex discrimination claim regarding her "proposed reassignment [to C&P]" was not accepted for investigation. Plaintiff's two remaining claims for disparate treatment based on sex discrimination (training and award) were accepted for investigation.

Plaintiff amended her formal complaint of discrimination on May 2, 2003, and on May 8, 2003, ORM sent a letter of acceptance of the training, award, and reassignment [to Environmental Health and Safety Service] claims of sex discrimination for investigation.

Plaintiff withdrew the training claim during the pendency of the complaint, and was allowed to amend her EEO complaint to add the following retaliation complaint: "was Kosel discriminated against due to reprisal concerning her January 2004 evaluation?" Plaintiff's award and reassignment claims stated:

> Claim B -Award:
> On or about September 17, 2002, Kosel became aware that a male coworker was recommended for a $3,000.00 award. Kosel alleges that every year since 1998, she has received an outstanding rating and every year she is told there is no award money.
>
> Claim C - Reassignment:

> On April 14, 2003, Kosel received a memorandum that effective March 30, 2003, she was reassigned to Environmental Health and Safety Service.

Plaintiff's allegations were investigated by the EEO investigator. An Equal Employment Opportunity Commission ("EEOC") Administrative Judgment ("AT) held a hearing on Plaintiff's complaint on September 2, 2004. On September 10, 2004, the AJ issued a decision finding no discrimination, and the VA issued a final order implementing the EEOC AJ's decision on October 18, 2004. On January 18, 2005, Plaintiff filed this lawsuit.

II. FACTUAL BACKGROUND

The undisputed facts establish the following:

Plaintiff is a female Physician's Assistant employed at the Temple, Texas VA hospital. She began her employment with the VA in January 1995 in Waco, Texas. In 1995, Waco, Temple, and Austin integrated and became the Central Texas Veterans Healthcare System (CTVHCS). In the summer of 1995, Plaintiff requested a transfer to Temple, which occurred in September 1995. She was assigned to Primary Care, and Dr. Allen Price became her supervisor. In November 1999, she was reassigned to the Hospitalist Team.

Dr. Allen Price submitted an award application to Nancy Beimer ("Beimer"), an Administrative Officer, for Plaintiff's performance in the extended care intermediate care unit in 1999. Beimer stated that there was no money available to fund monetary awards at that time and she did not submit the proposal to the

awards committee. Plaintiff did receive a four-hour-time-off award and a few cash awards totaling approximately $550.

In September 2002, Dr. T. Ulf Westblom, Chief of Medical Services, transferred Plaintiff to the Compensation and Pension (C&P) section to assist in performing C&P examinations. Once Dr. Van Wormer and Dr. Westblom became aware that Plaintiff had previously worked with the Chief of C&P and who Plaintiff alleged had sexually harassed her, Plaintiff was returned to the Hospitalist Team. Joe Bielik ("Bielik"), another Physician's Assistant within the Medical Service, was assigned to the C&P Unit and was directed to continue to perform bone marrow biopsies on a limited basis from his assignment in C&P. In late August 2002, Bielik received a $3000.00 award for performing bone marrow biopsies.

Plaintiff began bone marrow biopsy training but was unable to successfully complete the training due to a physical limitation. In early 2003, Dr. Westblom was Acting Chief of Staff for Dr. Van Wormer who was on maternity leave. On March 19, 2003, Dr. Westblom proposed to Ray, the Union President, that Plaintiff be reassigned to Employee Health and Environmental Medicine. Dr. Westblom, Ray, and Plaintiff met on March, 26, 2003 to discuss this proposal. On March 28, 2003, Dr. Westblom reassigned Plaintiff to Employee Health and Environmental Medicine and reassigned Bielik back to the Hospitalist Team.

III. LEGAL STANDARDS

A. Employment Discrimination

In order to prevail on a claim of illegal discrimination, the plaintiff bears the burden of proving that the defendant intentionally discriminated against her. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502,113 S.Ct. 2742 (1993). The plaintiff may prove her case by offering direct evidence of intentional discrimination. *See Portis v. First Nat'l Bank of New Albany*, 34 F.3d 325, 328 n.6 (5th Cir. 1994). "Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact (i.e., unlawful discrimination) without any inferences or presumptions." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir.1993). There is no direct evidence of discrimination presented by Plaintiff in the present case.

Because direct evidence of discrimination is so rare, a plaintiff may present circumstantial proof of discrimination through the burden-shifting analysis first outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 40 (5th Cir. 1996). Once the plaintiff establishes a *prima facie* case, she creates a rebuttable presumption, or inference, of discrimination, and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action taken against the plaintiff. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1089 (5th Cir. 1995); *see also U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *McDonnell Douglas*, 411 U.S. 792. If the defendant does offer a non-discriminatory reason for its employment decision, the burden then shifts back to the plaintiff to prove that the reason offered by the defendant was not its true reason, but was merely a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248,

253 (1980). A reason is deemed a pretext if the plaintiff shows "both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Center v. Hicks*, 113 S.Ct. at 2752 (emphasis in original). Once a nondiscriminatory reason is given, "the presumption of discrimination derived from the plaintiffs *prima facie* case 'simply drops out of the picture,' and 'the ultimate question [is] discrimination vel non.'" *Mayberry*, 55 F.3d at 1090 (citing *Hicks*, 113 S.Ct. at 2749 and 2753). "The existence of competing evidence about the objective correctness of a fact underlying a defendant's proffered explanation does not in itself make reasonable an inference that the defendant was not truly motivated by its proffered justification." *Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir.1991). "The question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive." *Mayberry*, 55 F.3d at 1091.

The elements required to establish a *prima facie* case must, of necessity, vary with the specific facts of a particular case. *McDonnell Douglas*, 411 U.S. at 802, n. 13. In a typical discrimination suit, the plaintiff establishes a *prima facie* case by showing: (1) she belongs to a protected class; (2) she was subjected to an adverse employment decision; (3) she was qualified for the position held or sought; and (4) the position was filled by someone outside of the protected class, or others similarly situated were treated more favorably. Okoye v. *Univ. of Tex. Health Sci. Ctr.*, 245 F.3d 507, 512-13 (5th Cir. 2001). Ultimate employment decisions include acts "such as hiring, granting leave, discharging, promoting, and compensating." *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir.1995). "Title VII was designed to address ultimate employment decisions, not to address

every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." Id. Likewise, actions by an employer that lack any consequence would not constitute adverse employment actions. *Mattern v. Eastman Kodak Company*, 104 F.3d 702, 708 (5th Cir.1997) (verbal threat of being fired, reprimand for not being at assigned station, missed pay increase, and being placed on "final warning.").

To establish a *prima facie* case of retaliation, a plaintiff must show that (1) she engaged in protected activity; (2) an adverse employment action was taken against her; and (3) a causal link existed between the protected activity and the adverse employment action. *Fierros v. Tex. Dept of Health*, 274 F.3d 187, 191 (5th Cir. 2001).

B. Exhaustion of Administrative Remedies

An aggrieved employee must initiate contact with an EEO Counselor within 45 days of the date of the alleged discriminatory event to attempt to informally resolve the matter. 29 C.F.R. § 1614.105(a)(1); *Teemac v. Henderson*, 298 F.3d 452, 454 (5th Cir. 2002). If an employee fails to seek informal counseling, the employee's claim is barred. *Pacheco v. Rice*, 966 F.2d 904, 905 (5th Cir. 1992). The employee must establish waiver, estoppel, orequitable tolling to circumventthis requirement. *Id.*

One of the primary purposes of an EEOC charge is to put an employer on notice of the existence and nature of the charges against it. *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 879-80 (5th Cir. 2003). A Title VII suit is limited to "the scope of the EEOC investigation which could reasonably grow out of the

administrative charge." *Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993). A court action cannot encompass facts or issues not relating to the subject matter of the EEOC charge. Id.

C. Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045,1050 (5th Cir.1982), quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 598 (1969). It is well settled that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Boudeloche v. Grow Chemical Coatings Corps.*, 728 F.2d 759, 762 (5th Cir. 1984); *Kaiser*, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts well pleaded in the complaint should be accepted as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986). "The question therefore is whether in the light most favorable to Plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 Wright and Miller, *Federal Practice and Procedure*, Section 1357 at 601.

D. Summary Judgment

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law." FED. R. Civ. P. 56 (c). A disputed material fact is genuine if the evidence is such that a jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). The initial burden to demonstrate the absence of a genuine issue concerning any material fact is on the moving party. *Celotex v. Catrett, 477 U.S. 317, 325 (1986).* This burden can be satisfied by pointing out to the district court that there is an absence of evidence to support an essential element of the non-moving party's case. *Id.* Upon such a showing, the burden shifts to the non-moving party to establish that there is a genuine issue. Id. at *324.* "[T]he plain language of Rule *56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at *322.* "[C]onclusory allegations unsupported by concrete and particular facts will not prevent an award of summary judgment." *Anderson, 477 U.S.* at *247.*

IV. ARGUMENTS AND ANALYSIS

A. Special Recognition Award

1. Exhaustion of Administration Remedies

Defendant argues that Plaintiff failed to notify the EEO counselor in a timely manner, which should bar her claim. Defendant asserts that the fact that the Department of Veterans Affairs accepted and

investigated the untimely claim does not serve as a waiver of the exhaustion requirement.

Plaintiff argues that the circumstances surrounding Plaintiff's claim for a monetary award were not known to Plaintiff until after she learned that a male Physician's Assistant, Joe Bielik, had received a substantial monetary award in 2002.

2. Prima Facie Case

Next, Defendant argues that Plaintiff has not suffered an adverse employment action by not receiving the award. Defendant also argues that Plaintiff cannot establish that a similarly situated employee outside her protected class was treated differently than her. Contrary to Plaintiff's assertions, Defendant states that Bielik was not similarly situated because his Special Recognition Award was submitted and approved in 2002 for his outstanding performance in bone-marrow biopsies. Plaintiff does not allege and there is no documentary evidence that her supervisor submitted a Special Recognition Award application on her behalf in 2002 although Dr. Price testified that he did submit an award application. Defendant asserts that the evidence establishes that in 1999, when the award applications for Plaintiff and Dr. William Quinn were allegedly submitted, there was no award money for large awards (Special Recognition Awards). Further, Defendant argues that Plaintiffs sex discrimination claim fails because Dr. Quinn, a male, also failed to receive the award in 1999.

Plaintiff argues that the issue before this Court involves disparate treatment on the basis of sex because Plaintiff purportedly "saved the VA millions of dollars" by revising nursing home protocols and did not

receive any monetary award of her efforts, but her male counterpart later received a $3000 bonus in 2002 for learning a new skill and amending his Scope of Services that he was qualified to perform.

3. Legitimate, Non-Discriminatory Explanation

Lastly, Defendant argues that it has proffered a legitimate, non-discriminatory explanation for its actions. Defendant states that at the time Dr. Price submitted both Plaintiff's and Dr. Quinn's award requests in 1999, he was told by Beimer that there was no money for the awards at that time. Dr. Price admitted that he did not doublecheck on the availability of award money with the Human Resources Department. Dr. Price testified that he later submitted award requests for Plaintiff and she received two spot cash awards for a total of $300 in 1999. In addition, Plaintiff also received cash awards in the amounts of $150, $100, and a four-hour-award-time-off award. On March 11, 1998, Dr. Bankim Bhatt, Chief of Primary Care Services, recommended a special advancement of Plaintiff from VN-12, Step 8 toVN-12, Step 10. On March 31, 1998, as Chief of Medical Services, Dr. Westblom approved this recommendation, and effective April 12, 1998, Plaintiff received a pay adjustment, which amounted to an increase in salary of $2,926.00.

Defendant provides evidence that award recommendations for Physician's Assistants are submitted to the Human Resources (HR) department by section heads, then routed through a bargaining panel, and are ultimately signed off by the Chief of Staff. HR makes the final determination as to money availability. In the VA, there is no money for performance awards for Physician's Assistants as, in

1997, the law changed, and the VA went under the performance authority that meant there are no per se performance awards. If there is a freeze on award money, HR does not accept applications because the boards are suspended during this period. Dr. Westblom states that he did not receive a written award request for Plaintiff from Dr. Price for his review and recommendation.

In May 2002, Dr. Westblom received a memorandum commending Bielik for outstanding performance in bone marrow biopsies. In August 2002, Dr. Westblom submitted a Special Contribution Award Recommendation for Bielik stating that his work saved CTVHCS from having the procedure done in the private sector or from having to replace the prior technician. Bielik's Special Recognition Award was approved for $3,000.00.

Plaintiff notes that Dr. Price testified that Plaintiff's 1999 revisions of medical protocols for nursing home patients resulted in "millions of dollars" that had and would continue to be saved as a result of Plaintiff's efforts. Beimertold Dr. Price that there was no money available when he gave Plaintiff's award application so Beimer did not deliver the application to the awards committee. Plaintiff asserts that Beimer did not advise Dr. Price that the application could be resubmitted if and when monies became available. Thus, Plaintiff alleges that as a result of Beimer's failure to process Plaintiff's application properly, Plaintiff was denied an opportunity to receive this award. Instead, Plaintiff merely received $550 in cash awards and a four-hourtime-off award.

Plaintiff asserts that Bielik volunteered to be trained to perform bone marrow biopsies and his salary was not affected nor was he required to work overtime

to perform bone marrow biopsies. Plaintiff alleges that there were no cost "savings" for the biopsies that Bielik performed because a technician at a lower GS pay level previously performed the biopsies. Further, Plaintiff states that award applications must be initiated by an employee's immediate supervisor, and Bielik's supervisor at that time was Dr. Roby, not Dr. Westblom who submitted Bielik's award application. Lastly, Plaintiff asserts that several of the biopsies performed by Bielik were insufficient and the number of biopsies appear to be inflated.

4. Analysis

The record shows that Plaintiff went to the EEO counselor within 45 days of her knowledge of circumstances surrounding her claim on monetary award. Plaintiff's EEO complaint states that she became aware of Bielik's award on or about September 17, 2002. Plaintiff testifies in her Affidavit that she became aware of Bielik's $3,000.00 award shortly before she went to the EEO counselor on October 4, 2002. Thus, the court finds that Plaintiff exhausted her administrative remedies on this claim.

Plaintiff has not established a prima facie case of sex discrimination because there is no adverse employment action. Failure to receive the monetary award lacks any consequence and does not even arguably tangentially effect any ultimate decisions. See Mattem, 104 F.3d at 708; Dollis, 77 F.3d at 782.

Alternatively, even if Plaintiff could establish a prima facie case, Defendant has proffered a legitimate, non-discriminatory (non-retaliatory) reason for its actions (i.e., lack of funds for monetary awards in 1999) and Plaintiff has not demonstrated any pretext for sex

discrimination (or retaliation). Plaintiff's argument that Beimer failed to properly advise Dr. Price that he could resubmit Plaintiff's application when funds were available for awards does not demonstrate pretext of sex discrimination. There is no evidence that Biemer intentionally misled Dr. Price to discriminate against Plaintiff because of her sex. Allegations that Defendant did not follow the proper procedure for submission of Bielik's award does not raise any issues of pretext of sex discrimination as to Plaintiff. Arguments that Bielik's award was not justified have no relevance to pretext of sex discrimination as to Plaintiff because Bielik's award was for different performance and his award was three years after Dr. Price prepared Plaintiff's award application. Further, Plaintiff has not provided any evidence that there was actually money available during the period that her award application was prepared by Dr. Price.

Thus, Defendant's motion for summary judgment on this claim should be granted.

B. Reassignment to Employee Health and Environmental Medicine

Defendant first argues that Plaintiff cannot establish a prima facie case of sex discrimination because her reassignment to Employee Health and Environmental Medicine was not an adverse employment action. It asserts that it was a lateral transfer or a transfer that did not involve a demotion.

Alternatively, Defendant argues that Plaintiff cannot overcome the Defendant's legitimate non-discriminatory reasons for reassigning her. Following a staffing review of the Hospitalist program in 2001, chief of Staff Dr. Van Wormer, requested that Dr.

Westblom, the former Chief of Medical Service, identify a Physician's Assistant to reassign. This request was made in order to effect the realignment decision made after the staffing review, which was to move to seven full-time Physicians requiring two of the Physician Extender (i.e., Physician's Assistant) positions be converted to one full-time Physician position, leaving only one Physician Extender position on the team. Dr. Westblom responded by explaining that he needed someone who could perform bone marrow biopsies because the person who had been performing them retired. Thus, Dr. Westblom recommended that Plaintiff be reassigned to C&P. That reassignment did not occur.

In March 2003, Dr. Westblom served as the Acting Chief of Staff. During this time, due to the Employee Health and Environmental Medicine department receiving approval for a full-time Physician Extender, Dr. Westblom, for the same reasons he had previously articulated to Dr. Van Wormer, reassigned Plaintiff to Employee Health and Environmental Medicine and reassigned Bielik back to the Hospitalist Team. Dr. Westblom stated to the Union President that there is an ongoing need for bone marrow aspirations and biopsies as they are critical for delivery of quality care to patients with malignancies, unexplained anemia or opportunistic infections. He also explained that with the transfer of Bielik to C&P, there were serious problems with performing the biopsies in a timely manner, which was ultimately affecting the quality of care given to the veterans. Thus, Dr. Westblom stated that the proposal to transfer Plaintiff would address patient's needs and would take into consideration employee's interests including Bielik's to return to the

Medical Service and Plaintiff's who has always had a good working relationship with Dr. Price.

Defendant asserts that there were no other Physician Extenders within the Medical Service who were qualified and available to do bone marrow biopsies. In March 2003, Vicki Maxwell was a Physician's Assistant in the Oncology department with the Medical Service. Even though Maxwell had previous training in performing bone marrow aspirations, and it was in her Scope of Practice, Defendant states that Dr. Westblom, after consulting with the Chief of Oncology, Dr. Mukhopadhyay, decided not to have Maxwell perform the aspirations. Dr. Mukhopadhyay had concerns because of Maxwell's highly specialized duties and already busy schedule within the Oncology department, which would preclude her from finding time to do the bone marrows in a timely fashion. Further, Defendant asserts that two other male Physician's Assistants in the Medical Service, David Goodrich and Mike McMillan, were not available because they did not have the medical privileges to perform bone marrow aspirations.

Plaintiff argues that although she did not assert formal sex discrimination claims in 1998, 1999, and 2001, the following are evidence to support her claim: (1) Dr. Westblom forced her to accept an assignment in Cardiology instead of allowing her to be assigned to the Hospitalist Team (July, 1998); (2) Dr. westblom forced her to accept an assignment in the Nursing Home Unit because a JCAHO review was imminent and serious deficiencies had to be addressed (May, 1999); (3) Dr. Westblom reassigned her to Cardiology when she returned from maternity leave (2001); (4) Dr. Westblom told her that she would not get her hospitalist job back when she returned from maternity leave with her

second child (July, 2002); (5) Dr. Westblom repeatedly threatened to reassign her to Pulmonary, or alternatively to Cardiology (July, 2002); and (6) Dr. Westblom reassigned her to C&P, which was not part of the department of medicine and did not involve patient care. Plaintiff also testified in her Affidavit that in September of 2002, when Dr. Westblom reassigned Plaintiff to C&P, the bed control manager, Deloris Payne, told Dr. Roby that she hoped Plaintiff would stay on the hospitalist team and that Bielik would be reassigned. Plaintiff testified that Dr. Roby stated "Yes, but Caroline [Plaintiff] has children."

Plaintiff argues that since her assignment to Employee Health and Environmental Medicine, she has not been allowed to do any patient care except as backup for Dr. Price. Her duties are primarily clerical, which include filling out preprinted forms for Registries of the VA System. Plaintiff asserts that with such limited opportunities to deliver medical care, Plaintiff's ability to achieve re-certification as a Physician's Assistant in 2007 is severely compromised.

Even if Plaintiff could establish a prima facie case of sex discrimination, the Court finds that Plaintiff cannot overcome Defendant's legitimate non-discriminatory (and non-retaliatory) reasons for reassigning Plaintiff to Employee Health and Environmental Medicine. Plaintiff's mere subjective belief that she was discriminated against, standing alone, is not adequate evidence to survive a summary judgment motion. See Byers v. *Dallas Morning* News, *Inc.*, 209 F.3d 419, 427 (5th Cir. 2000). Plaintiff has provided evidence that she enjoyed her work as a Hospitalist and that she was most interested in staying in this position. She also provided evidence that she opposed the transfer and voiced this opposition.

However, Plaintiff was reassigned to a Physician's Assistant position and admits that she does provide some patient care in this position. Further, Defendant considered the quality of patient care and the special skills of Bielik to perform bone marrow biopsies to make the decision to reassign Plaintiff. Plaintiff's evidence of isolated remarks concerning her gender and responsibilities are insufficient to establish pretext for sex discrimination (or retaliation).

Thus, Defendant's motion for summary judgment on this claim should be granted.

C. Retaliation

Defendant argues that Plaintiff does not assert a claim of retaliation in her Complaint. Defendant also alleges that Plaintiff failed to exhaust her administrative remedies as to retaliation in relation to her two remaining sex discrimination claims.

Alternatively, Defendant asserts that Plaintiff cannot establish a prima facie case of retaliation because the degree of material adversity an employer action must cause before a plaintiff may bring a Title VII retaliation claim is not met. *Burlington N. & Santa Fe Ry. Co. v. White, U.S.* , 126 S . Ct. 2405, 2415 (2006) ("[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, `which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."'"). Defendant argues that Plaintiff's loss of the award is not an adverse employment action because she was not automatically entitled to an award. *See Rabinovitz v. Pena*, 89 F.3d 482, 488-89 (7th Cir. 1996) (loss of bonus). Further, Defendant argues that Plaintiff's

reassignment was not an adverse employment action because it did not involve a change in her grade and pay. O'*Neal v. City of Chicago*, 392 F.3d 909, 911-13 (7th Cir. 2004) (lateral transfer).

Defendant alternatively argues that it has proffered legitimate, nondiscriminatory (and non-retaliatory) reasons for its actions and Plaintiff has failed to present any evidence of pretext.

Plaintiff asserts that her reassignment to Employee Health and Environmental Medicine was not a lateral transfer, but was instead a drastic change in work responsibilities. Plaintiff argues that *Burlington* holds that whether reassignment of duties constitutes a materially adverse action is a jury question.

The Court will assume that it has ancillary jurisdiction to hear Plaintiff's retaliation claims because they appear to grow out of the EEOC charge that is properly before this Court. *See Gupta v. East Texas State Univ.*, 654 F.2d 411, 41314 (5th Cir.1981).
The *Burlington* Court stated:

> Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee [] from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found "[r]etaliatory work assignments" to be a classic and "widely recognized" example of "forbidden retaliation." . . .

> To be sure, reassignment of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and "should be judged from the perspective of a reasonable person in the plaintiffs position, considering 'all the circumstances.'"

Burlington, 126 S.Ct. at 2416-17.

Regarding Plaintiff's prima facie case of retaliation as to her reassignment, Plaintiff has merely provided her own subjective belief that she would prefer to work in the Hospitalist position. The Court does not believe that *Burlington* requires this issue to be heard by a jury. Thus, Plaintiff has failed to establish a prima facie case. Alternatively, as discussed under Section B, even if Plaintiff could establish a prima facie case of retaliation, the Court finds that Plaintiff cannot overcome Defendant's legitimate non-discriminatory (and non-retaliatory) reasons for reassigning Plaintiff to Employee Health and Environmental Medicine.

Although Plaintiff does not argue her retaliation claim for not receiving the monetary award, the Court finds that Plaintiff failed to establish a prima facie case of retaliation as to the monetary award and alternatively as discussed under Section A, Plaintiff cannot overcome Defendant's legitimate, non-discriminatory (and nonretaliatory) reason for its actions.

Thus, Defendant's motion for summary judgment on Plaintiff's retaliation claims should be granted.

In light of the foregoing, it is

ORDERED that Defendant's Motion for Summary Judgment is GRANTED. It is further

ORDERED that Defendant's Motion to Dismiss is DENIED as moot. It is further

ORDERED that any and all motions or requests not previously ruled upon by the Court are DENIED.

SIGNED on this 23rd day of October, 2006.
WALTER S. SMITH, JR.
CHIEF UNITED STATES DISTRICT JUDGE

CIVIL ACTION NO. W-05-CA-021
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CAROLINE HOELSCHER-KOCE Plaintiff,
v.
R. JAMES NICHOLSON, Secretary, Department of Veterans Affairs, Defendant.

ORDER

Before the Court is Plaintiff's Motion For Reconsideration of Order Granting MSJ And, Alternatively, Motion For New Trial. The Court, having considered the Motion, response, pleadings, and applicable legal authority, finds that the Motion lacks merit and should be denied. Accordingly, it is

ORDERED that Plaintiff's Motion For Reconsideration of Order Granting MSJ And, Alternatively, Motion For New Trial is DENIED.

SIGNED on this 12TH day of December 2006
WALTER S. SMITH, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Filed 11/20/07

No. 07-50061 Summary Calendar
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CAROLINE HOELSCHER-KOSEL,
Plaintiff-Appellant

v.

JAMES NICHOLSON, SECRETARY OF
VETERANS AFFAIRS,
Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING

JUDGES: Before JOLLY, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

RELEVANT PROVISIONS INVOLVED

42 U.S.C.A. § 2000e-2(a)
(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-3

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor

organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.